

5 Official Opinions of the Compliance Board 121 (2007)

EXECUTIVE (NOW ADMINISTRATIVE) FUNCTION EXCLUSION – SCHOOL BOARD REVIEW OF ETHICS PANEL’S DETERMINATION, HELD TO BE WITHIN THE EXCLUSION

March 5, 2007

Ms. Maude Franceschina

The Open Meetings Compliance Board has considered your complaint that the Frederick County Board of Education violated the Open Meetings Act in connection with a closed meeting on September 13, 2006. For the reasons explained below, we conclude that the meeting was not subject to, and therefore did not violate, the Open Meetings Act.

I

Complaint and Response

The closed session on September 13, 2006, involved an ethics matter. The particular issues are irrelevant here. It suffices to say that the matter concerned a member of the Frederick County Board of Education and reached the County Board after consideration by County Board’s Ethics Panel.

The complaint pointed out a discrepancy between the time of the session as reported on the County Board’s website and the actual time as recorded on the written statement prepared when the session was actually closed. That is, the agenda on the website indicated that the closed session would start at 11:30 a.m., whereas the written statement indicated that the session was closed at 10:45 a.m. The complaint included information about the ethics matter and conjectured that the County Board might have considered payment of the individual member’s legal fees incurred in connection with the ethics matter. The complaint also questioned whether a public body must hold an open session prior to closing a meeting and provide specific reasons for a closed session.¹

¹ The complaint commented that the County Board holds many closed sessions, the reasons for which are often vague, and contended that “in many instances ... these sessions are in violation of the Open Meetings Act.” The complaint also stated a suspicion that the County Board holds many “executive function” meetings without the public’s knowledge.

(continued...)

In a timely response on behalf of the County Board, Andrew Nussbaum, Esquire, denied that any violation occurred.² The response noted the several means by which the County Board routinely gives notice of its meetings. As to the closed session on September 13, the response indicated that, “[j]ust prior to that meeting, it was decided to extend the time for the closed meeting, and as a result, the meeting began at 10:45 a.m. ... That amended information was e-mailed to the media at approximately 9:10 a.m. on the morning of September 13, 2006.” A copy of the amended notice, with a notation that it had been e-mailed, was enclosed with the response. The response went on to observe that, “[s]ince it was a Closed Meeting in any event, the public would not have been invited whether it began at 11:30 a.m. or 10:45 a.m., so the exact time had no impact on the public.”³ The response addressed the process by which the session was closed, then turned to the subject of the session and the application of the Act.

The response indicated that during the closed session, the County Board consulted with Mr. Nussbaum and with Jamie Cannon, Executive Director of Legal Services, regarding an advisory opinion that had been issued by the County Board’s Ethics Panel. There was also discussion, but no action taken, in regard to the legal appropriateness of reimbursing legal fees incurred by a member of the County Board in connection with the Ethics Panel’s investigation.

The County Board’s position is that the session involved an executive function, outside the scope of the Open Meetings Act. Alternatively, the County Board argued that the session was properly closed under the Open Meetings Act, in that the reason for the closed session was to consult with counsel to obtain legal advice. The response elaborated on the County Board’s position on why the matter

¹ (...continued)

These allegations are too general for us to address, except to point out that public notice of a meeting is not required if the meeting is outside the scope of the Act, as executive function (now administrative function) meetings are. *See* Part IIA below. We limit our review to the September 13 closed session discussed in the text.

² The Compliance Board granted Mr. Nussbaum a brief extension of time to submit a response.

³ As explained in Part II below, the meeting was not subject to the Act. No notice of it was required. Consequently, no issue about the change in the meeting time arises. However, when a meeting is subject to the Act, the fact that it is expected to be closed does not excuse compliance with all elements of the Act’s notice requirement, including announcing the time of the meeting. Hence, if the starting time of a closed meeting is changed from that originally announced, an amended notice must be issued (as the County Board’s response said was done here). The public is entitled to be present when a public body conducts the procedural requirements to close a meeting under the Act.

constituted an executive function and the need for confidentiality in connection with an ethics matter.

II

Analysis

A. Criteria for Executive (Now Administrative) Function Exclusion

In closing the session of September 13, the County Board followed procedures as if the session were subject to the Open Meetings Act. Nevertheless, a public body is free to use these procedures even if a meeting is not subject to the Act, and in light of the County Board's response, we must first consider whether the discussion involved an executive (now administrative) function.⁴ If the session did involve an executive function, neither the substantive nor the procedural requirements of the Open Meetings Act would have applied; consequently, no violation of the Act could have occurred. §10-503(a)(1)(i).⁵ *See, e.g., 4 OMCB Opinions* 188, 191 (2005).

The relevant definition is as follows:

(1) "Executive [now administrative] function" means the administration of:

- (i) a law of the State;
- (ii) a law of a political subdivision of the State; or
- (iii) a rule, regulation, or bylaw of a public body.

(2) "Executive [now administrative] function" does not include:

- (i) an advisory function;

⁴ As noted in the County Board's response, effective October 1, 2006, the term "executive function" was changed to "administrative function." However, the scope of the exemption remains unchanged. *See 5 Open Meetings Compliance Board* 86, 87 n. 1 (2006). In the remainder of the opinion, we shall use the term "executive function," because that was the phrasing in the law at the time of the meeting.

⁵ Unless otherwise noted, all statutory references are to the Open Meetings Act, Title 10, Subtitle 5 of the State Government Article, Annotated Code of Maryland. While there are exceptions to the exclusion, namely the granting of a license or permit or any zoning matter, these exceptions are not relevant to the September 13 session.

- (ii) a judicial function;
- (iii) a legislative function;
- (iv) a quasi-judicial function; or
- (v) a quasi-legislative function.

§10-502(b). Determining whether a matter constitutes an executive function involves a two-part analysis. We first ask whether the topic of discussion falls within the definition of any other defined function. If so, the analysis ends, because a topic included within another function by definition cannot be an executive function. If the topic of discussion does not fall under another defined function, we ask whether the public body was involved in “the administration of” an existing law or regulation. If not, the discussion cannot be an executive function. Implicit in the second step are two subsidiary points: There must be an identifiable prior law or regulation to be administered, and the public body must be vested with legal responsibility for its administration. *See, e.g., 5 OMCB Opinions* 42, 44 (2006).

B. Review of Ethics Panel’s Determination

As we understand the facts, the primary purpose of the closed session on September 13 was to review, with legal counsel, the findings of the County Board’s Ethics Panel. Under the Maryland Public Ethics Law, each county board of education is required either to adopt conflict of interest regulations governing board members, school officials, and staff or to operate under the respective county’s conflict of interest regulations. State Government Article §15-812, Annotated Code of Maryland. The County Board has opted for the former approach. Its Policy 109 creates an Ethics Panel to consider, among other things, conflict of interest issues. The policy provides, in relevant part, that the Ethics Panel “hears and makes findings as to complaints filed by any person(s) alleging violation of this policy. All complaints are treated confidentially and will, upon determination of the Ethics Panel, be referred to the Board of Education for recommended action.”

It appears to us that, at the September 13 closed session, the County Board was carrying out its role in reviewing findings of the Ethics Panel in connection with a complaint. It was administering its own regulations adopted pursuant to a State statute. There is no suggestion in the record before us that the discussion involved changing its policies. Because its action was not within any other defined function under the Act and involved the administration of its existing rules for review of the Ethics Panel’s findings and recommended action, we agree with the County Board that its discussions involved an executive function outside the scope of the Act.⁶

⁶ The County Board did not address whether its discussion might be within the Act’s definition of “quasi-judicial function.” §10-502(i). If it were, it would not qualify as an executive function. However, the result would be the same, because quasi-judicial functions are also outside the scope of the Open Meetings Act. §10-503(a)(1)(iii).

C. Legal Fees

The question remains whether a discussion concerning reimbursement of a County Board member's legal fees qualifies as an executive function. The County Board cited 4 *OMCB Opinions* 197 (2005) in support of its affirmative answer. In that opinion, we agreed with the Board of County Commissioners for Queen Anne's County that its decision, pursuant to a public local law, to appoint outside counsel retroactively to represent the County's Ethics Commission and pay related legal fees from an existing appropriation qualified as an executive function under the Open Meetings Act.

Based on the limited record before use, it appears that the discussion centered on two intertwined issues – whether the County Board would reimburse a member for certain legal fees incurred, and the legal appropriateness of doing so. As in 4 *OMCB Opinions* 197, both of these issues concern the administration of existing law or policy. Therefore, the discussion involved an executive function outside the scope of the Open Meetings Act.

III

Conclusion

The discussion by the Frederick County Board of Education on September 13, 2006, concerning a determination of the County Board's Ethics Panel and the payment of a County Board member's legal fees in connection with the Ethic Panel's investigation, involved an executive function. Therefore, neither the substantive nor the procedural requirements of the Open Meetings Act applied.⁷ There was no violation.

OPEN MEETINGS COMPLIANCE BOARD

Courtney J. McKeldin
Tyler G. Webb

⁷ In light of our conclusion that the Act did not apply, we do not reach the questions posed in the complaint concerning the Act's requirements. As to the need for a public body to start in an open session prior to closing a meeting under the Act, *see* §10-508(d) and note 3 below. As to the required public disclosure of information in advance of a closed session, *see* 5 *OMCB Opinions* 33 (2006).